

1988

# Gerald Golding v. Ashley Central Irrigation Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GERALD GOLDING, individually, )  
and as representative of the )  
heirs of RANDAL GOLDING, )  
deceased, )

Plaintiff/Appellant, )

vs. )

ASHLEY CENTRAL IRRIGATION )  
COMPANY, a Utah corporation, )  
Defendant/Respondent. )

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Case No. 880025  
Category No. 14b

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BRIEF OF RESPONDENT

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Appeal from the Seventh Judicial District  
Court of Uintah County, State of Utah  
The Honorable Dennis L. Draney, Judge.

---

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FILED

JUN 7 1988

U.S. Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GERALD GOLDING, individually, )  
and as representative of the )  
heirs of RANDAL GOLDING, )  
deceased, )

Plaintiff/Appellant, )

vs. )

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COMPANY, a Utah corporation, )

Defendant/Respondent. )

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### STATEMENT OF JURISDICTION

The Supreme Court of the State of Utah has jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(i) and Rule 4(a) of the Rules of the Utah Supreme Court.

### NATURE OF THE PROCEEDINGS BELOW

Defendant filed a Motion for Judgment on the Pleadings. The trial court granted Defendant's Motion and dismissed the Complaint. The Plaintiff then filed his Notice of Appeal.

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

Defendant submits the following as issues on appeal.

1. Whether to reverse the lower court's decision dismissing the Plaintiff's Complaint when the Complaint, without allegation or claim of willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity on the part of the Defendant, claimed a right to recover damages when a 17 year old boy, a trespasser, drown while swimming in Defendant's irrigation canal?

2. Whether this Court should reverse the lower court's decision dismissing Plaintiff's Complaint because Plaintiff now claims that with additional time he might develop facts with which he could correct the deficiencies in the Complaint filed in the case?

### STATUTES INVOLVED

Utah Code Ann. §57-14-3:

Except as specifically provided in subsections (1) and (2) of §57-14-6, an owner of land owes no duty of care

to keep the premises safe for entry or use by any person using the premises for any recreational purpose, or to give any warning of a dangerous condition, use, structure, or activity on those premises to those persons.

Utah Code Ann. §57-14-6

Nothing in this act limits in any way any liability which otherwise exists:

(1) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity or for deliberate, willful, or malicious injury to persons or property; or

(2) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land or use the land for any recreational purpose....

#### STATEMENT OF THE CASE

The Ashley Central Irrigation Company, Defendant, is, a nonprofit irrigation company which operates a irrigation canal in Uintah County, Utah known as the central canal. The central canal is used by the Defendant to distribute water to its stockholders who are farmers in the area.

On June 25, 1986, Randal Golding, age 17, and his friends were swimming in the central canal. (R.2, 28) Randal Golding and his friends were swimming in the canal without the knowledge or consent of the Defendant and had not paid any fee for swimming in the canal. (R.14, No.3) One of the friends, Shawn Jackson, was caught in the current and pulled over a spillway. (R.2) Randal Golding tried to assist Shawn Jackson. (R.2) Randal Golding was caught in the current and pulled under the water. He was discovered approximately 150 feet below the spillway some 20



minutes later. (R.2) Randal Golding died two days later. (R.2, 3) Plaintiff's Complaint (Addendum 1) alleged that the Ashley Central Irrigation Company had breached a duty to Golding to use ordinary care in the maintenance and operation of the canal, by failing to maintain its canal, by failing to secure the canal, by failing to post warnings and failure to clear the canal from debris and hazardous obstructions. (R.3) The Ashley Central Irrigation Company filed an Answer and Motion for Judgment on the Pleadings alleging that the duty upon which the Complaint is premised was not owed to the Plaintiff or Randal Golding. (R.20) The Motion for Judgment on the Pleadings was based on the common law of the State, Loveland vs. Crem City Corp., 746 P.2d 763 (Utah 1987) and Utah Code Ann. §57-14-1 et seq. The trial court granted the Motion and dismissed the Complaint. (Addendum 2)

#### SUMMARY OF ARGUMENT

1. The long standing rule in Utah is that an irrigation company's only duty to individuals swimming in its canals is to not be willful or malicious in failing to warn of dangerous conditions. The Plaintiff's Complaint and Memorandum admits that Randal Golding and his friends were swimming in the Defendant's canal and that Randal Golding drowned as a result of that activity. The Complaint did not allege, and there are no facts showing willful or malicious conduct by the Ashley Central Canal Company which caused Randal Golding's death. The Court acted properly in dismissing the Complaint.

2. Utah Code Ann. §57-14-1 et seq., restates and expands, to all recreation activities, the common law regarding irrigation canals. Utah Code Ann. §57-14-3 provides that a land owner owes no duty of care to keep his premises safe for entry or use by persons using the premises for recreational purposes nor does the land owner have a duty to give any warning of a dangerous condition, use, structure or activity on the premises to those persons. Pursuant to Utah Code Ann. §57-14-3 Ashley Central Canal Company did not owe the duty alleged in Plaintiff's Complaint and therefore, the Court acted properly in dismissing the Complaint.

3. Plaintiff's Complaint contains no allegations that the Defendant acted in a willful, wanton or malicious manner which would create liability under the common law or Utah Code Ann. §57-14-1, et seq. Plaintiff could not allege any such facts since none existed because the Defendant was unaware that Randal Golding and his friends were swimming in Defendant's canal.

4. Plaintiff had a year and a half between the injury and the court's ruling dismissing the Complaint in which to discover facts supporting a claim against the Defendant. Plaintiff was given time beyond that provided by the rules within which to respond to Defendant's Motion to Dismiss and his claim now that additional time should be given to develop facts to support a valid Complaint were not properly raised below and should not be considered by this Court.

## ARGUMENT

POINT I. PLAINTIFF ADMITS RANDAL GOLDING WAS SWIMMING IN DEFENDANT'S IRRIGATION CANAL WITHOUT THE KNOWLEDGE OR PERMISSION OF DEFENDANT. THERE ARE NO ALLEGATIONS THAT DEFENDANT ACTED WILLFULLY OR MALICIOUSLY AND THEREFORE, THE COURT PROPERLY DISMISSED THE COMPLAINT.

This Court has recently affirmed the long-standing common law in this State that canal companies owe no duty to trespassers, except to refrain from willful and wanton conduct, in the operation and maintenance of their irrigation canals. Loveland vs. Orem City Corporation, 746 P.2d 763 (Utah 1987); Trujillo vs. Brighton Northpoint Irrigation Company, 746 P.2d 780 (Utah 1987); Brinkerhoff vs. Salt Lake City, 371 P.2d 211 (Utah 1962) and Charvoz vs. Salt Lake City, 131 P.2d 901 (Utah 1913). Utah Code Ann. §57-14-1 et seq., also provides that liability exists to persons using premises for recreational purposes only for willful or malicious failure to guard or warn against the dangerous condition, use, structure or activity or for deliberate willful or malicious injury to persons or property. Randal Golding was swimming in Defendant's irrigation canal without the knowledge or permission of the Defendant. The trial court, therefore, properly dismissed the Complaint finding no duty was breached by the Defendant.

A. This Court, For 70 Years, Has Continually Held That Irrigation Companies Such As The Defendant Are Not Liable For Failure To Safeguard Persons Like Plaintiff From Dangers From Swimming In Irrigation Canals.

In Trujillo vs. Brighton Northpoint Irrigation Company, supra the Plaintiff, a child, had fallen into a pool of water in

the Defendant's irrigation ditch. As a result he suffered permanent injuries. The irrigation company moved for Summary Judgment which was denied by the trial court. The irrigation company then filed an Interlocutory Appeal. This Court granted the Appeal and ruled:

Brighton Northpoint argues as a matter of law, it cannot be held liable for failing to safeguard children from dangers posed by water in an unfenced irrigation ditch. We agree with Brighton Northpoint and conclude that it was entitled to the Summary Judgment it sought.

Id., at 781.

In Loveland vs. Orem City Corporation, supra a toddler had fallen into the North Union Irrigation Company's cement lined canal and had drowned. The court, in upholding the dismissal of the Complaint as to the irrigation company, held that:

Nevertheless, after carefully reviewing our cases and all those cited by the parties, we follow those of our cases which hold that the owner/possessors of canals are not subject to liability under the attractive nuisance doctrine.

Id., at 772.

The facts set forth in the Complaint show that Randal Golding, a 17 year old boy, together with other teenage friends was swimming in the Defendant's canal. He was there without the consent or knowledge of the canal company. One of the boys, Shawn Jackson, was caught in the undercurrent. Randal Golding, while attempting to assist him, was also caught in the current and drowned. These are the same facts that existed in the Loveland and Trujillo cases, except in this case Randal Golding

was older than the toddlers involved in those cases.

Plaintiff attempted to distinguish those cases, in the lower court, by arguing that they apply only to the attractive nuisance doctrine. In making that argument Plaintiff fails to recognize that without the attractive nuisance doctrine, he is a trespasser and therefore, is not owed the duties of care alleged in the Complaint. In addition, it was pointed out in Trujillo that the rule announced in Charvoz applies regardless of the theory argued to subject canal owners to liability for harm to children.

Plaintiff's Complaint alleges that Defendant owed a duty of care to the Plaintiff and was negligent in failing to maintain its canal in a proper and safe manner, failure to properly secure areas of extreme danger, failure to post appropriate warnings, failure to clear the canal of debris and hazardous obstructions and failing to take reasonable actions to protect the public. The law in this State, which has existed since 1913, establishes that there is no such duty.

B. The Utah Legislature Has Expanded The Common Law To Provide That The Only Duty Owed By Defendant Was To Avoid Willful And Malicious Conduct Toward Plaintiff When He Used The Irrigation Canal For Recreational Purposes.

Utah Code Ann. §57-14-3 states:

Except as specifically provided in subsections (1) and (2) of §57-14-6, an owner of land owes no duty of care to keep the premises safe for entry or use by any person using the premises for any recreational purpose, or to give any warning of a dangerous condition, use, structure, or activity on those premises to those persons.

Recreational purpose includes swimming. Utah Code Ann. §57-14-2(3). Utah Code Ann. §57-14-6 provides that:

Nothing in this act limits in any way any liability which otherwise exists:

(1) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity or for deliberate, willful, or malicious injury to persons or property; or

(2) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land or use the land for any recreational purpose....

Plaintiff admits that Randal Golding did not pay to swim in the canal. Therefore, unless Utah Code Ann. §57-14-6(1) applied, there was no duty owed by the Defendant to Randal Golding. The Plaintiff admits that Defendant did not know Randal Golding was swimming in the canal. Plaintiff's Complaint is based upon negligence, claiming that Defendant owed a duty to the decedent in the construction, maintenance and operation of its canal.

To state a cause of action against the Defendant, Plaintiff must allege and prove willful and malicious conduct by the Defendant. A recent commentator on Utah Code Ann. §54-14-1 et seq., stated:

The owner owes no one a duty of inspection, and has no obligation to exercise due care. He is liable only for actively (not simply negligently) injuring the entrant, or for failing to warn the entrant of dangers under circumstances that suggest the landowner deliberately allowed the entrant to fall victim to a concealed trap.

Recent Developments in Utah Law, Recreational Landowner Liability, 1980 Utah L. Review 236, 238.

In Ewell vs. United States, 579 F.Supp 1291 (D. Utah 1984) aff'd 776 F.2d 246 (10th Cir. 1985), the court in applying Utah law defined willful misconduct as "the intentional failure to do an act with the knowledge that serious injury is the probable result." Id. at 1295.

In Riccuti vs. Robinson, 269 P.2d 282 (Utah 1954) this Court defined willful misconduct in a case arising under the automobile quest statute as requiring an intentional act with knowledge that serious injury will result.

There is nothing in the Complaint alleging that the Defendant acted in a willful or malicious manner which caused injury to the Plaintiff. Plaintiff cannot make such allegations in good faith because there are no facts that would support such a claim. (R.14, Response to Request to Admit No. 4 and Response to Request No. 5)

The Defendant, in the instant case, had no knowledge that Randal Golding was swimming in its canal. The Defendant could not have intentionally injured Randal Golding since it was not aware of him.

POINT II. PLAINTIFF'S PLEA ON APPEAL FOR ADDITIONAL TIME TO DEVELOP FACTS TO CORRECT HIS DEFICIENT COMPLAINT WAS NOT PROPERLY MADE BELOW AND WOULD NOT HAVE CHANGED THE DECISION TO DISMISS HAD IT BEEN GRANTED.

The main thrust of the Plaintiff's appeal is that he needs more time to attempt to locate facts to support a claim of malicious and willful conduct by Defendant. In his brief Plaintiff concedes that his Complaint is insufficient and asks for time to gather facts that would support an Amended Complaint. Plaintiff had one and one-half years to find the facts, if any existed. The injury occurred on June 25, 1986. Almost a year later on June 19, 1987 the Complaint was filed. The Motion for a Judgment on the pleadings was filed on October 12, 1987. According to Rule 2.8(b) of the Utah Rules of Practice, the Plaintiff had 10 days to submit a statement of answering points and authorities and counter-affidavits. He contacted the Defendant's counsel by a letter dated October 26, 1987 and requested an extension of time, until November 15, 1987 in which to file a Memorandum in Opposition of the Defendant's Motion. The Defendant's counsel agreed and the District Court was notified. (Addendum 3) Plaintiff's Memorandum was finally submitted on November 20, 1987. Plaintiff, therefore, took nearly one month longer, than allow by the rule, to respond to the Motion. No affidavits were submitted. No Motion for more time was filed with the court.

The Plaintiff argues that a request for an extension of time



was made in his Memorandum. The Memorandum does not support that claim. The paragraph relied on by Plaintiff asks the court to rule on the legal issues, then it says if the court decides to rule against him more time will be needed to produce facts sufficient to support his claim. (R.35) The Plaintiff filed no Motion with the court and made no request of the Defendant's counsel for any additional extension of time. According to Rule 7(b)(1) of the Utah Rules of Civil Procedure a Motion to the court must be made in writing and should state with particularity the grounds for the Motion and the relief sought. The Plaintiff's inclusion within his Memorandum of a suggestion that additional time be allowed only if the court should rule against him is insufficient to constitute a Motion.

Additionally, Rule 11 of the Utah Rules of Civil Procedure provides that an attorney must have a legal and factual basis for filing a Complaint. In this case a year and a half had passed between the injury and the court's ruling and the Plaintiff is still asking for time to locate facts he could use to file an Amended Complaint. Plaintiff should have determined a factual basis for this lawsuit before he filed the Complaint. A proper investigation would have prevented this lawsuit as there are no facts to support a claim against the Defendant.

CONCLUSION

The duty owed by the Ashley Central Irrigation Company to Randal Golding was to refrain from willful or malicious conduct which would cause injury. The Plaintiff's Complaint does not allege any willful or malicious conduct by the Ashley Central Irrigation Company which caused Randal Golding's death. Plaintiff could not make such allegations because there are no facts to support such a claim. Furthermore, the Plaintiff is barred from any recovery by Utah's recreational use statute. The trial court, therefore, acted properly in granting the Defendant's Motion for Judgment on the Pleadings, and its ruling should be sustained.

Respectfully submitted this 10 day of June, 1988.

NIELSEN & SENIOR  
Attorneys for Defendant/  
Respondent

By: \_\_\_\_\_

Clark B. Allred

## ADDENDUM

ADDENDUM 1

Richard I. Ashton, Esq. (A-0136)  
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Attorneys for Plaintiff

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR UINTAH COUNTY

STATE OF UTAH

GERALD GOLDING, Individually,  
and as representative of the  
heirs of RANDAL GOLDING,  
deceased,

Plaintiff,

vs.

ASHLEY CENTRAL IRRIGATION  
COMPANY, a Utah corporation,

Defendant.

COMPLAINT

Civil No. \_\_\_\_\_

Judge Assigned:

Dennis L. Draney

JURY TRIAL DEMANDED

Plaintiff, Gerald Golding, individually, and as representative of the heirs of Randal Golding, by and through his undersigned counsel, Richard I. Ashton of ASHTON & BENSON, alleges and complains against the Defendant as follows:

PARTIES AND JURISDICTION

1. Plaintiff, Gerald Golding, is a resident and citizen of the State of Utah, residing in Uintah county.

2. Plaintiff was the natural father of Randal Golding, deceased, and is the representative of the heirs of the estate of Randal Golding.

A 3. The Defendant is a corporation organized under and pursuant to the laws of the State of Utah and doing business in Uintah County, State of Utah.

#### PRELIMINARY ALLEGATIONS

1. Plaintiff hereby incorporates all of the preceding allegations into the Preliminary Allegations.

Wsk 2. On or about June 25, 1986, the Plaintiff's decedent, Randal Golding, together with friends, had decided to go swimming at approximately 2500 West 1500 North in Vernal, Utah.

Wsk 3. Plaintiff's decedent, Randal Golding and a friend Shawn Jackson, entered the canal above a spill-way and were wading and swimming in water approximately chest deep.

Wsk 4. As Randal and Shawn were exiting the canal, the current caught and pulled Shawn Jackson under the water and over the spill-way.

Wsk 5. Randal Golding jumped into the water below the spill-way, reached for and grabbed Shawn Jackson pushing him free of the current.

Wsk 6. After rescuing Shawn Jackson, Randal Golding was unable to extricate himself from the current and was pulled under the water.

Wsk 7. Randal Golding was discovered under the water approximately 150 to 200 ft. below the spill-way, approximately 20 minutes after having gone under water.

Wsk 8. Randal Golding was pulled from the water, given

resuscitation, taken to Ashley, Valley Medical Center and subsequently lifelifted to L.D.S. Hospital in Salt Lake City where he subsequently died on June 27, 1986.

FIRST CLAIM FOR RELIEF

NEGLIGENCE

¶ 9. Plaintiff hereby incorporates all of the preceding allegations of this Complaint into his First Claim for Relief.

¶ 10. At all times material hereto, Defendant Ashley Central Irrigation Company owed a duty to Plaintiff to use ordinary care in the construction, maintenance and operation of its waterways, ditches and irrigation canals so as to avoid subjecting Plaintiff's decedent and other similarly situated to the unwarranted risk of accident, injury or death.

¶ 11. Defendant breached the duty of care owed to Plaintiff and was negligent in at least the follow particulars:

(a) in failing to maintain its waterways, canals and ditches in a proper and safe manner;

(b) in failing to properly secure areas of extreme danger;

(c) in failing to post appropriate warnings to the public of the extreme danger surrounding its waterways, canals, ditches and spillways;

(d) in failing to clear its waterways, canals, ditches and spillways of debris and hazardous obstructions unreasonably dangerous to life and limb;

(e) in failing to take reasonable steps to protect the public in the face of knowledge and information that its canals, ditches, spillways and waterways were unreasonably dangerous to life and limb; and,

(f) in being otherwise negligent.

12. As a direct and proximate result of the negligence and wrongful acts and omissions of the Defendant, Plaintiff's decedent sustained fatal injuries.

13. As a further direct and proximate result of the negligence and wrongful acts of the Defendant, Plaintiff has suffered special and general damages as set forth hereinafter.

#### DAMAGES

14. By reason of the wrongful acts and omissions of the Defendant, Plaintiff sustained injuries as follows:

(a) medical expenses for the last care of Plaintiff's decedent, Randal Golding;

(b) funeral and burial expenses;

(c) loss of care and support, present and future of Plaintiff decedent, Randal Golding, and,

(d) loss of love society and affection of Plaintiff decedent, Randal Golding.

15. As a result of the injuries sustained by Plaintiff, Plaintiff has been damaged as follows:

(a) loss of care and support, present and future, in an amount as yet presently undetermined and Plaintiff

prays for such sums upon proof thereof;

(b) for medical expenses and funeral expenses incurred for the last care and burial of Plaintiff's defendant, Randal Golding, in an amount as yet presently unascertained but exceeding Twenty Thousand Dollars (\$20,000.00), and Plaintiff prays that he be allowed all sums incurred for medical treatment and burial of Plaintiff's decedent upon proof thereof; and,

(c) for loss of love society and affection of Plaintiff's decedent, Randal Golding.

16. Plaintiff demands trial by jury on all issues set forth in Plaintiff's Complaint.

#### PRAYER OF THE COMPLAINT

WHEREFORE, Plaintiff seeks relief of the Court and prays for judgment against the Defendant as follows:

1. Damages for medical, funeral and burial expenses in an amount not yet fully ascertained, but exceeding Twenty Thousand Dollars (\$20,000.00), and Plaintiff prays that he be awarded such sum upon due proof thereof.

2. For loss of care and support, present and future, from Plaintiff's decedent.

3. For general damages for loss of love society and affection of Plaintiff's decedent in a sum not less than TWO HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000.00).

4. For costs of Court and costs of this litigation as is allowable by law.



5. For such other and further relief as the Court may deem just and proper under the circumstances.

DATED this 19<sup>th</sup> day of June, 1987.

ASHTON & BENSON

By 

Richard I. Ashton  
Attorneys for Plaintiff

JURY TRIAL DEMANDED

ADDENDUM 2

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

---

GERALD GOLDING, Individually,	)	
and as representative of the	)	ORDER OF DISMISSAL
heirs of RANDAL GOLDING,	)	
deceased,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ASHLEY CENTRAL IRRIGATION	)	
COMPANY, a Utah corporation,	)	
	)	
Defendant.	)	Civil No. 87-CV-157U

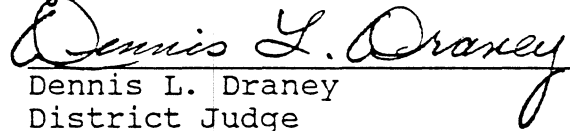
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The above captioned matter came before the Court pursuant to Defendant's Motion for Judgment on the Pleadings. Defendant's Motion alleged that Defendant owed no duty to the decedent pursuant to the terms of Utah Code Ann. Section 57-14-3. Defendant also filed a Supplemental Memorandum asserting that it owed no duty to the deceased pursuant to the recent decisions of Loveland vs. Orem City Corporation, 70 Utah Adv. Rep.2 (1987) and Trujillo vs. Brighton-North Point Irrigation Company, 70 Utah Adv. Rep.14 (1987). The Court having reviewed the pleadings, having reviewed the Memoranda submitted by the parties and being fully advised, hereby finds that there was no duty owed by the

Defendant to the decedent, that the pleadings do not contain any allegation of willful or malicious failure to guard or warn against any condition existing in, on or about the canal and the Court therefore grants the Defendant's Motion and hereby;

ORDERS, ADJUDGES AND DECREES that the Plaintiff's Complaint is dismissed.

DATED this <sup>5<sup>th</sup></sup> day of ~~December~~ <sup>January</sup>, 198<sup>8</sup>.

  
Dennis L. Draney  
District Judge

ADDENDUM 3  
LAW OFFICES OF  
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RICHARD I ASHTON  
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October 26, 1987

(801) 562-2281

Gayle F. McKeachnie, Esq.  
Clark B. Allred, Esq.  
NIELSEN & SENIOR  
363 East Main Street  
Vernal, Utah 84078

RE: Golding vs. Ashley Central Irrigation  
Civil No. 87-CV-157U

Dear Gayle & Clark,

I have received your Motion in Memorandum In Support of Judgment on the Pleadings in the above referenced matter. I have been unable to prepare my response within the 10 days provided by Rule 2.8 and I would specifically request that you defer submitting a request for Judgment.

I would very much appreciate your stipulation to allow me until November 15, within which to respond to your Motion and Supporting Memorandum. I am in trial all next week and perhaps for a portion of the following week. I shall assume that you are in agreement with extending me the necessary time until November 15, 1987, within which to respond to your motion.

Thank you very much for your cooperation.

Very truly yours,

ASHTON & BENSON

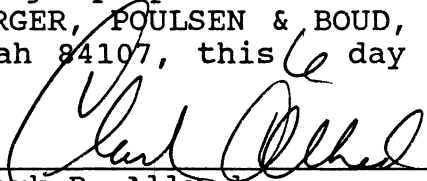
By   
Richard I. Ashton

RIA:db

cc: The Honorable Dennis Draney

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Brief of the Defendant/Respondent, postage prepaid and addressed to Richard I Ashton, ASHTON, BRAUNBERGER, POULSEN & BOUD, 302 West 5400 South, Suite 103, Murray, Utah 84107, this 6 day of June, 1988.

  
Clark B. Allred